Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No. 71-1058

MICHAEL BECKMAN,

Petitioner,

—against—

WALTER KIDDE & COMPANY, INC. and FYRE-SAFETY INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
The Questions Presented	2
Excerpts from the Complaint	3
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	15
Conclusion	15
Appendix A—Opinion of U.S. Court of Appeals for the Second Circuit	1a
Appendix B—Opinion of U.S. District Court, Eastern District of New York	3a
Appendix C—Order of the U.S. Court of Appeals for the Second Circuit	17a

Table of Authorities

Cases:

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 ..... 10, 11

Klor's Inc. v. Broadway-Hale Store, Inc., 359 U.S. 207 (1959) 6, 10

PAGE

Perma Life Mufflers, Inc. v. International Parts Corp. (1968), 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 14

Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 7

Radiant Burners, Inc. v. Peoples Gas, Light & Coke Company (1961), 364 U.S. 656, 660, 81 S. Ct. 365, 5 L. Ed. 2d 358 7

United States v. General Motors Corp., 86 S. Ct. 1321, 348 U.S. 127 (1966) 8

Statutes:

Sherman Act, Sections 1 and 2, 26 Stat. 209, as amended, 15 U.S.C. Sections 1 and 2 ..... 2, 4

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered on the 22nd day of November, 1971.

Citations to Opinions Below

The opinion of the Eastern District of New York dismissing the petitioner's action herein is printed in Appendix B hereto and is reported at 316 F. Supp. 1321 (EDNY 1970). The opinion of the Court of Appeals which affirmed the Order of the District Court for the Eastern District of New York is printed in Appendix A hereto and is not yet reported in the official reports.

Jurisdiction

This is an action brought to recover treble damages and reasonable attorney's fees under Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. Sections 1 and 2.

This is an appeal from a judgment of the Court of Appeals, printed in Appendix C hereto, entered on November 22nd, 1971, in which it affirmed the order of JUDGE JOHN R. BARTELS of the District Court of the Eastern District of New York, dated September 22nd, 1970 granting the cross-motion of both defendants for summary judgment, dismissing the complaint, upon the ground that the said complaint failed to adequately state a cause of action.

The Questions Presented

1. Was the intercompany conspiracy of the defendants sufficient to constitute one of the required elements in a per se violation of Section 1 of the Sherman Anti-Trust Act?

2. Was the defendants' admitted refusal to supply fire extinguishers to the plaintiff the result of a concerted boycott which would constitute a per se violation of Section 1 of the Sherman Anti-Trust Act, and was it adequately pleaded in the plaintiff's complaint?

3. If there was any insufficiency in the pleaded allegations of the complaint, should the plaintiff have been afforded an opportunity to replead?

Excerpts from the Complaint

"NINTH: That thereafter in accordance with an oral agreement, the plaintiff did purchase and defendants did supply to the plaintiff certain fire extinguishers which had been manufactured by the defendants and bore the brand name of Walter Kidde.

"TENTH: That these fire extinguishers were well known branded fire extinguishers distributed by the defendant, Walter Kidde & Company, Inc., through certain designated dealers for the Counties of Nassau and Suffolk, in the State of New York, other than the plaintiff.

"ELEVENTH: That the defendants continued to supply these fire extinguishers to the plaintiff commencing on or about the 27th day of October, 1966 until the 8th day of March, 1967.

"TWELFTH: That during the time hereinabove set forth, the plaintiff sold and rented the said fire extinguishers manufactured by Walter Kidde & Company, Inc. directly to the purchasing and consuming public.

"THIRTEENTH: That on or about the 8th day of March, 1967, the defendant, Walter Kidde & Company, Inc., entered into an agreement with its distributors of fire extinguishers other than the plaintiff wherein and whereby it was agreed that the plaintiff would be denied the right to make further purchases of the Walter Kidde line of fire extinguishers.

"FOURTEENTH: That this refusal on the part of the defendant, Walter Kidde & Company, Inc., and Fyre-Safety, Inc., to make further sales of the said fire extinguishers to the plaintiff constituted an unreasonable restraint of such trade interfering with free competition in business and commercial transactions."

Statutes Involved

Sections 1 and 2 of the Sherman Act, 26 Statute 209, as amended 15 U.S.C. Sections 1 and 2.

Statement

This is an action brought to recover treble damages and reasonable attorney's fees under Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. Sections 1 and 2. The complaint under attack by the cross-motion herein alleges that in March of 1967 the defendants refused to continue selling fire extinguishers to the plaintiff and further alleges that the defendants and their distributors or other "businessmen" had conspired to restrain and monopolize commerce in a manner which constituted a violation of the above-cited statutes.

The facts disclosed by both the complaint and various affidavits submitted on these motions indicate that Fyre-Safety, Inc. was a small independent company which was engaged in the door to door sale of home fire alarm systems. The said defendant, Fyre-Safety, Inc., manufactured a portion of the fire alarm systems it sold and purchased the balance of its requirements, in a fully manufactured state, from suppliers other than the co-defendant.

The other defendant herein, Walter Kidde & Company, Inc., is a large conglomerate which acquired full ownership of the co-defendant during the course of the year 1965. After the acquisition, both companies retained their independent status. The defendant, Fyre-Safety, Inc., continued to do business in the same independent manner that had been its custom prior to the acquisition of its stock by the co-defendant. There was never any attempt to merge the identities or operations of the two companies.

Walter Kidde & Company, Inc. commenced its corporate life many years ago with the manufacture of an extremely well-known line of fire extinguishers. It designated dealers who distributed their line of fire extinguishers and at the time of the events which are the subject of this lawsuit had designated dealers who distributed the fire extinguisher line, in the Counties of Nassau and Suffolk in the State of New York. In May of 1966, the plaintiff noticed an advertisement in the Wall Street Journal which offered an exclusive franchise for the Counties of Nassau and Suffolk for the distribution of home fire alarm systems manufactured by the defendant, Fyre-Safety, Inc. Several months subsequent thereto the plaintiff purchased a franchised dealership for the Counties of Nassau and Suffolk, which authorized him to sell home fire alarm systems in the said counties.

The defendant, Fyre-Safety, Inc., in accordance with an oral arrangement between the plaintiff and itself, also supplied the plaintiff with a line of fire extinguishers which bore the brand name of the co-defendant, Walter Kidde & Company, Inc., and which were obtained from the said co-defendant. The plaintiff then began a rather new and unorthodox method of merchandising these fire extinguishers. There are many large industrial plants located in the Counties of Nassau and Suffolk, and these plants have large requirements for fire extinguishers. The plaintiff had the novel idea of offering to rent; and service the plant fire extinguisher requirements of these various industrial companies on an annual contract basis. This was a departure from the usual outright sale type business which was being conducted by the regularly established Walter Kidde & Company dealers located in these two counties. The plaintiff experienced great success with this type of merchandizing and before long this represented the most important

part of his business. Thereafter, in March of 1967, the defendant, Fyre-Safety, Inc., refused to sell the plaintiff any of the fire extinguisher line which had been previously supplied. These fire extinguishers had been purchased by Fyre-Safety, Inc. from its parent company, Walter Kidde & Company, Inc. It is admitted by the defendants that there was a refusal to continue to supply this line of fire extinguishers to the plaintiff. The defendants, by means of their affidavits, have stated that this refusal to continue to supply the fire extinguishers was occasioned by the plaintiff's refusal to pay a legitimate price increase which had been posted by the defendants. The defendants do not set forth any of the details concerning the alleged price increase. They fail to state the amount of such price increase and whether the price increase applied equally to all dealers. The defendants further fail to state whether the price increase was made by the prime supplier, Walter Kidde & Company, Inc., or was made solely by Fyre-Safety, Inc.

In answer to this allegation of a price increase, the plaintiff states in his affidavit of June 3, 1970 that he was never told about any price increase. He further states that a Mr. Frick, the former president of Fyre-Safety, Inc., told him to "stick to fire alarm systems".

The pleading requirements necessary to state a cause of action under the anti-trust laws have always been liberally construed. The Supreme Court's decision in *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) demonstrates that allegations of an unlawful refusal to deal are sufficient to state a cause of action. Such unlawful refusals to deal are defined as those which result from a conspiracy of more than one company or from the attempt of any company to monopolize any portion of the market, and thereby restrain free commerce and trade. Such allega-

tion alleging a per se violation of the anti-trust act is sufficient. *Radiant Burners, Inc.* v. *People's Gas Light & Coke Company* (1961), 364 U.S. 656, 660, 81 S. Ct. 365, 5 L. Ed. 2d 358.

The Courts have always been reluctant to grant summary judgment in anti-trust litigation. Thus in the case of *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 7 L. Ed. 2d 458, 83 St. Ct. 486, the Court said the following:

> "We believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice."

The District Court herein made the following statement in its opinion (Appendix B page 9a).

> "Upon examination of the pleadings and the affidavits submitted by both parties, *together with Beckman's refusal to resort to any further discovery proceedings*, the Court is convinced that there is no genuine issue as to a material fact with respect to the alleged violation of Section 1 of the Sherman Act." (Emphasis supplied.)

From the above statement it is readily apparent that the lower Court is penalizing the plaintiff for his alleged refusal to conduct certain offered pre-trial procedures in order to aid the lower Court in its determination of the motions herein. A transcript of the argument and proceed-

ing which led the lower Court to make this statement is a part of the original record of this case. An examination of the transcript will immediately indicate that the lower Court, at the time of the argument of the motions herein, offered the plaintiff an opportunity for a hearing to be held thirty days hence, at which time the plaintiff could offer, by means of oral testimony, further facts to buttress its claim. There was no explicit direction or offer made by the lower Court of any specific discovery proceedings. Even if the lower Court assumed that the plaintiff would recognize that such proceedings were implicit in the Court's direction, the lower Court, by means of its offer, mandated the completion of the plaintiff's discovery proceedings in less than thirty days. It is respectfully submitted that this presented the plaintiff with an impossible task and was an unreasonable exercise of the Court's discretion. Furthermore, the plaintiff takes the position that his complaint was adequate without further proof.

The Courts have held on many occasions that when businessmen conspire to deprive another merchant of an opportunity to compete freely in the marketplace, this will constitute a per se violation of Section 1 of the Sherman Anti-Trust Law. The Courts have further recognized that this objective may be accomplished in several ways. The Supreme Court of the United States has stated on several occasions that price fixing as part of a conspiratorial attempt to deprive a merchant of free and equal access to the market would constitute a per se violation. Thus in the case of *United States* v. *General Motors Corp.*, 86 S. Ct. 1321, 348 U.S. 127 (1966), the Court said the following:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others access to merchandise which the latter wish to sell to the public, we need not inquire into the economic moti-

> vation underlying their conduct . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that it need not be saved by reference to the need for preserving the collaborator's profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy might be directed . . . We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful per se when sought to be effected by combination or conspiracy . . . And the per se rule applies even when the effect upon prices is indirect."

The disclosure by the defendant of a price rise affecting the merchandise sought to be purchased by the plaintiff, without any further proof that this price rise was not discriminatory and intended to drive the plaintiff from the marketplace, certainly poses the question which should be answered by a full-fledged trial and a full opportunity afforded the plaintiff to conduct discovery procedures.

In its decision, the District Court made the following statement (Appendix B page 9a):

> "Defendants submitted a second affidavit by William R. Yocom which substantiates in greater detail their position that the refusal to deal was not pursuant to a conspiracy and that no factual, and hence no triable issue, existed on this claim. Specifically, he states that Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase. . . ."

It is respectfully submitted that this is one of the essential triable issues presented in this case. The plaintiff contends that the alleged price increase was a device used by the defendants to drive him from the fire extinguisher business, The defendants, however, contend that this was a normal business decision. It is respectfully submitted this poses the factual question which must be decided by a jury.

There can be no question that if the defendants, as a result of a conspiracy, denied the plaintiff the opportunity to purchase the fire extinguishers, this would constitute a per se violation of Section 1 of the Sherman Anti-Trust Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 211, 79 S. Ct. 705, 3 L. Ed. 2d 741. The complaint in this case alleges that the defendants conspired with their other distributors to deprive him of the fire extinguisher merchandise. This conspiracy probably resulted from the novel method of merchandising these fire extinguishers, which had been adopted by the plaintiff. This upset the established method of doing business and caused the conspiracy to drive the plaintiff from the fire extinguisher business and restrict him solely to the home fire alarm business, for which he held the franchise. A recent case which analyzed the nature of group boycotts constituting a per se anti-trust violation was the case of *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, in which the Court said the following:

> "We return, then, to the group boycott cases on which the plaintiff relies. Such boycotts have been held to be illegal per se under Section 1 because they are naked restraints of trade with no purpose except stifling of competition.... We find that in all plaintiff's cases there was purpose either to exclude a person or

group from the market, or to accomplish some other anti-competitive objective, or both."

This precisely is the plaintiff's contention in this case. The plaintiff contends that there was a conspiracy to drive him from the fire extinguisher market and that this was sought to be accomplished in two ways. Firstly, it is obvious that there was discrimination in price fixing and secondly that there was a concerted refusal to deal with him and supply fire extinguishers. It is respectfully submitted that either of these two types of conduct would be sufficient, if proven on trial, to provide a basis of granting judgment for the plaintiff.

The affidavits submitted by all parties herein indicate that there was a consultation between Walter Kidde, the parent corporation, and Fyre-Safety, Inc., the subsidiary corporation, before the alleged price increase was announced to the plaintiff. Of course, the plaintiff claims that the result of the consultation between the defendants was not a price increase but an outright refusal to supply the requested merchandise. Furthermore, the plaintiff states that any price increase was directed solely against him and was part of the plan to deprive him of access to the Walter Kidde line of fire extinguishers. It is the plaintiff's position that this intercompany agreement was sufficient to satisfy the conspiracy requirements of the Sherman Anti-Trust Law. The case of *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, cited *supra*, states, at page 82, the following concerning intercompany conspiracies:

"It is now settled law that if a corporation chooses to conduct parts of its business through subsidiary or affiliated corporations, and conspires with them to do something that independent entities cannot con-

spire to do under section 1 of the Sherman Act, it is no defense that the corporations are, in reality a single economic entity. The Supreme Court has said that 'common ownership and control does not liberate corporations from the impact of the antitrust laws.' Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 215, 71 S. Ct. 259, 261, 95 L.Ed. 219. See also Fortner Enterprises, Inc. v. United States Steel Corp., 1969, 394 U.S. 495, 507, 89 S. Ct. 1252, 22 L.Ed. 2d 495; Perma Life Mufflers, Inc. v. International Parts Corp., 1968, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 20 L.Ed. 2d 982; Timken Roller Bearing Co. v. United States, 1951, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199; Schine Chain Theatres, Inc. v. United States, 1948, 334 U.S. 110, 116, 68 S.Ct. 947, 92 L.Ed. 1245; United States v. Yellow Cab Co., 1947, 332 U.S. 218, 227, 67 S.Ct. 1560, 91 L.Ed. 2010."

The District Court in this case stated that one of the reasons for granting summary judgment was the failure of the plaintiff to set forth one of the required elements necessary to prove a per se violation. The District Court in effect stated that even if we assume a refusal to deal, there was a complete failure on the part of the plaintiff to indicate any conspiracy which constituted the basis of this boycott (Appendix B, page 10a), when it said the following:

"Recognizing the insufficient foundation of the claimed conspiracy between Kidde and its distributors, Beckman sought to save his cause by the belated allegation that Fyre-Safety and Kidde engaged in an illegal conspiracy, citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), condemning a conspiracy between two subsidiaries of a

parent company. Kiefer-Stewart, however, is distinguishable on the crucial ground that the conspiracy in that case was between two competing subsidiary companies, whereas in the instant case Beckman does not contend or offer any evidence to indicate that Fyre-Safety and Kidde were in competition with one another."

In other words, the lower Court in this case has indicated that an intercompany conspiracy is not sufficient, absent a showing that the two intercompany elements were in direct competition with each other. It is respectfully submitted that this goes beyond the requirements set forth by the Supreme Court of the United States. A reading of the *Kiefer-Stewart* decision does not indicate that when a plaintiff alleges an intercompany conspiracy, he must also demonstrate competitive conduct between the two subsidiaries or the parent and subsidiary, in order to succeed.

A perusal of the transcript of the argument of the motion in the lower Court herein will indicate that the plaintiff's attorney orally requested leave to file a supplemental affidavit containing a request that the Court grant the plaintiff leave to plead over should it find that the pleaded allegations of the complaint were insufficient. The plaintiff's attorney, during the course of the argument, indicated that the failure to include such a request in the papers previously filed had been due to an inadvertence on his part and that he sought to correct that by filing the supplemental affidavit containing this request. It is respectfully submitted that this constitutes a sufficient basis under the Federal Rules of Civil Procedure to grant the plaintiff leave to plead over should any of the allegations prove to be insufficient.

In considering this problem the U.S. Supreme Court in the case of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968), said the following:

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 974, 95 L.Ed. 1199 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227, 67 S. Ct. 1560, 1565, 91 L.Ed. 2010 (1947). In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, Albrecht v. Herald Co., 390 U.S. 145, 150, n. 6, 88 S.Ct. 869, 872, 19 L.Ed. 2d 998 (1968); Simpson v. Union Oil Co., supra, or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination,' United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 1862, 18 L.Ed. 2d 1249 (1967); United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed. 2d 505 (1960). Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that pleadings 'be so construed as to do

substantial justice.' Rule 8(f), Fed.Rules Civ. Proc. The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy."

Reasons for Granting the Writ

The petition raises substantial and important questions concerning the extent to which the Court will allow actions for a per se anti-trust violation resulting from refusals to deal to be based upon intercompany agreement for the exclusion of third parties from the marketplace. This Court in its decision of *Kiefer-Stewart Company* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) has indicated that a conspiracy between two subsidiaries of a parent company is a sufficient basis upon which to rest an action for a per se anti-trust violation. The District Court in its decision has limited this doctrine by its requirement that the two subsidiary companies in such a situation must be competing. The Court of Appeals by its opinion has adopted in toto the reasoning of the lower Court. It has been the appellant's contention that there is no such requirement set forth in the *Kiefer-Stewart* case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97—September Term, 1971.

(Argued October 6, 1971 Decided November 22, 1971.)

Docket No. 35670

MICHAEL BECKMAN,

Plaintiff-Appellant,

—v.—

WALTER KIDDE & COMPANY, INC. and
FYRE-SAFETY, INC.,

Defendants-Appellees.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and SMITH, *Circuit Judges.*

Plaintiff-appellant, alleging illegal conspiracy in violation of Sections 1 and 2 of the Sherman Act as amended, 15 U.S.C. §§1 and 2, sought treble damages and reasonable attorneys' fees.

Upon cross-motions for summary judgment Judge Bartels, United States District Court for the Eastern District of New York, granted judgment for defendants and filed a written opinion reported at 316 F.Supp. 1321 (EDNY 1970).

Affirmed.

Appendix A

LAWRENCE LAUER, New York City, *for Appellant.*
GEORGE T. SIEGEL, GATES & LABER, New York City, *for Appellees.*

PER CURIAM:

By this appeal plaintiff-appellant seeks the reversal of an order entered in the court below upon cross-motions for summary judgment. Plaintiff's action seeking Sherman Antitrust Act treble damages and attorneys' fees was dismissed.

When rendering his decision the trial judge filed a comprehensive opinion reported at 316 F.Supp. 1321 (EDNY 1970) in which he set forth his conclusions that plaintiff had failed to raise genuine issues as to the existence of any material fact entitling plaintiff to a trial. Even though this is an antitrust case we affirm the judgment below and do so substantially for the reasons and upon the reasoning contained in that opinion.

We recognize that a court should be extremely hesitant before it grants antitrust defendants' summary judgment motions and thereby deprives an antitrust plaintiff of a trial, see *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962); *Radiant Burners, Inc.* v. *People's Gas Light & Coke Company*, 364 U.S. 656, 660 (1961); and *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). However, we believe it clear that here the trial judge acted quite properly in ruling against plaintiff inasmuch as the ruling was deferred until plaintiff had been given an opportunity to obtain additional evidence to support his claims.

We are constrained to note that counsel for defendants-appellees did not file a brief or choose in any way to assist the court in the determination of the appeal.

Appendix B

Opinion of District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

70-C-29—September 22, 1970

MICHAEL BECKMAN,

Plaintiff,

—against—

WALTER KIDDE & COMPANY, INC.
and FYRE-SAFETY, INC.,

Defendants.

APPEARANCES:

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GATES & LABER, ESQS.
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BARTELS, *D.J.*

Plaintiff, Michael Beckman, entered into a written Regional Distributorship Agreement with the defendant Fyre-Safety, Inc.,[1] whereby Beckman was granted the exclusive

[1] Fyre-Safety, Inc. was a wholly-owned subsidiary of Walter Kidde & Company, Inc., which ceased doing business on December 31, 1967.

right in certain New York counties to sell fire alarm systems manufactured by the defendants. At the same time Fyre-Safety entered into an oral understanding with Beckman granting Beckman the right to purchase from Fyre-Safety fire extinguishers purchased from the co-defendant, Walter Kidde & Company, Inc.[2] In March, 1967, the defendants refused to sell any more fire extinguishers to Beckman. Claiming that both defendants and their distributors or other "businessmen" had conspired to restrain and monopolize commerce in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§1[3] and 2,[4] Beckman brought this action for treble damages and reasonable attorney's fees. He now moves for summary judgment upon these claims, and the defendants cross-move for the same relief. The facts as set forth in Beckman's pleadings and affidavits are susceptible of a brief exposition.

After the execution of the written franchise agreement and the oral agreement with respect to fire extinguishers,

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[2] Beckman claims that the right to purchase Kidde fire extinguishers was an oral term of the written distributorship agreement. The defendants assert that Beckman was permitted to purchase the extinguishers as a matter of courtesy. Resolution of this dispute is not here required.

[3] Section 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

[4] Section 2 provides in pertinent part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Appendix B

Fyre-Safety, in March, 1967, refused to continue to sell Beckman fire extinguishers which they had previously supplied. Beckman asserts that this refusal to sell was pursuant to a conspiracy with distributors or businessmen and therefore constitutes a *per se* violation of the Sherman Act. The allegation of conspiracy first appears in the complaint wherein Beckman alleges that "on or about the 8th day of March, 1967, the defendant, WALTER KIDDE & COMPANY, INC., entered into an agreement with its distributors of fire extinguishers other than the plaintiff wherein and whereby it was agreed that the plaintiff would be denied the right to make further purchases of the Walter Kidde line of fire extinguishers." In his affidavit in support of his motion for summary judgment Beckman's only reference to a conspiracy is his description of the cause of action as one "to recover damages under Sections 1 and 2 of the Sherman Act upon the ground that the defendants conspired with other businessmen to deprive the plaintiff of access to merchandise which the plaintiff had been previously selling and renting to members of the general public."

Kidde and Fyre-Safety do not contest the contractual background and the refusal to sell but strongly dispute Beckman's allegation that Fyre-Safety refused to ship to Beckman because of a conspiracy. In support of this position, the defendants submitted the affidavit of William R. Yocom (the National Sales Director for Fyre-Safety in the years 1966 and 1967), wherein he states that he is thoroughly familiar with the facts of the case and that he categorically denies the existence of any conspiracy. He further deposes that Fyre-Safety was always willing to sell fire extinguishers to Beckman but that Beckman refused to pay Fyre-Safety's price increase for the extinguishers. Yocom further further avers in his affidavit that

"Fyre-Safety was a small company, Kidde itself does not dominate the fire extinguisher field, and plaintiff could easily have purchased fire extinguishers from any number of companies some smaller and some larger than Kidde." Beckman does not dispute this latter statement.

Beckman in his affidavit in opposition to defendants' cross-motion for summary judgment denies that the refusal was predicated upon a price increase but states that there was a flat refusal to sell, and that the defendants nowhere in their papers have indicated the amount of such increase for the fire extinguishers and whether it applied equally to the customers of both defendants. In the same affidavit Beckman states that "when we have the answers to these questions we might, find an inter-company conspiracy as well as a conspiracy between the defendants and their other dealers. This case cries out for the full use of all the Discovery Procedures set forth in the Federal Rules of Civil Procedure." Following the alleged refusal to sell on March 8, 1967, Beckman terminated his distributorship agreement with Fyre-Safety by means of a letter dated April 12, 1967, written by his attorney, in which no mention was made that the termination was in any way due to defendants' refusal to sell or to any conspiracy.

The motions for summary judgment are addressed to both Section 1 and Section 2 claims under the Sherman Act. Section 2 prohibits monopolizing, or attempting to monopolize, or combining with others to monopolize, trade or commerce within any defined market. As to Section 2, the complaint and supporting affidavits are bereft of any statement showing or suggesting that either defendant violated this section; consequently, with respect to this claim, plaintiff's motion must be and is hereby denied and

defendants' cross-motion must be and is hereby granted. *McElhenney Co.* v. *Western Auto Supply Company*, 269 F.2d 332, 339 (4th Cir. 1959); see *Periodical Distributors, Inc.* v. *The American News Company, Inc.*, 416 F.2d 1330 (2d Cir. 1969); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D.N.Y. 1969).

The real issue in this case concerns plaintiff's motion for summary judgment under Section 1 of the Sherman Act and defendants' cross-motion for summary judgment with respect to the same claim. This section proscribes any contract, combination, or conspiracy in restraint of trade. To recover under this section plaintiff must establish (1) that there was a contract, combination, or conspiracy, and (2) that such contract, combination, or conspiracy was in [undue] restraint of trade. *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The question posed is whether the complaint and affidavits of Beckman are sufficient to raise any genuine issue concerning the two material facts above delineated. At the argument the court observed that Beckman's complaint and initial affidavits were conclusory in nature and lacked the necessary specifics to raise a genuine issue as to a material fact concerning either of the two elements necessary to constitute a Section 1 violation.

The purpose of a summary judgment is to screen out sham issues and "to discover whether one side has no real support for its version of the facts," (*Community of Roquefort* v. *William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962)), and "summary judgment cannot be defeated by the vague hope that something may turn up at trial." *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); see *Radio City Music Hall Corporation* v. *United States*, 135 F.2d 715 (2d Cir. 1943); *Jones* v. *The*

Borden Company, Slip Op. No. 28278, 5th Cir., July 15, 1970. Following the caveat of the Court of Appeals that "there may be some instances where summary judgment is too blunt a procedural device for deciding difficult cases. See for example, *Miller* v. *General Outdoor Advertising Co.*, 337 F.2d 944 (2d Cir. 1964)" (*Perma Research and Development Co.* v. *Singer*, *supra*, at 578; *Dolgow* v. *Dillon*, Slip Op. No. 711, 2d Cir., September 2, 1970), the court deferred its decision on the motion and offered to set down the application for a hearing one month thereafter, on June 10, 1970, in order to enable Beckman to establish, if possible, any specifics or facts in support of the existence of the conspiracy or the restraint of trade alleged as a *per se* violation of Section 1. See Rule 43(e), Fed. Rules Civ. Proc., 28 U.S.C.; 6 Moore's Fed. Prac. ¶56.11(7). During this interlude Beckman would have had ample opportunity, by means of discovery, to identify any distributors or others who were parties to the alleged conspiracy and to supply some evidence indicating in what manner there had been a restraint of trade.

Although in his papers he formally cried out for discovery, Beckman rejected the court's overture with its accompanying opportunity and, instead, relied upon the sufficiency of the complaint and affidavits already submitted. It was the court's inclination to immediately grant summary judgment in favor of the defendants. However, to remove any doubts as to whether any triable issue existed, the court then requested both parties to submit additional affidavits supporting their respective positions, which they did. Beckman submitted two additional affidavits but neither of them indicates that there exists a genuine issue as to a material fact necessary to defeat a summary judg-

ment motion.[5] Defendants submitted a second affidavit by William R. Yocom which substantiates in greater detail their position that the refusal to deal was not pursuant to a conspiracy and that no factual, and hence no triable issue, existed on this claim. Specifically, he states that Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase, that the decision was made without consultation with any distributor, competitor, or any other person, that the increase was applied equally to all distributors who wished to purchase fire extinguishers, and that at all times it was willing and indeed anxious to sell the plaintiff or any other customer fire extinguishers at the increased price.

Upon examination of the pleadings and the affidavits submitted by both parties, together with Beckman's refusal to resort to any further discovery proceedings, the court is convinced that there is no genuine issue as to a material fact with respect to the alleged violation of Section 1 of the Sherman Act. Accordingly, it hereby grants the defendants' cross-motion for summary judgment and hereby denies plaintiff's motion for summary judgment with respect thereto. Reference to the authorities in support of this conclusion is in order.

Contract, Combination or Conspiracy

In both the complaint and his affidavits, Beckman refers to two possible combinations, one involving a conspiracy

[5] The first one is by Beckman's attorney and merely argues that although Fyre-Safety was a wholly-owned subsidiary of Walter Kidde & Company, Inc., it nevertheless operated independently. The other affidavit, sworn to by Beckman, is addressed to a point not relevant to the issues presently before this court.

between Kidde and its distributors, and the other involving the relationship between Kidde and its subsidiary, Fyre-Safety. As to the first, the only answer given by Beckman to the defendants' catgorical denial of such conspiracy or combination was a re-allegation by Beckman, without more, of the conclusion that there was a conspiracy between Kidde and its distributors or other businessmen. No specifics were offered as to the identity of those distributors or other businesmen or how or when they illegally conspired or combined. A party cannot raise an issue of fact simply by relying upon the complaint or an affidavit setting forth only a bald conclusion that is flatly denied. Of course, the combination requirements of Section 1 may be satisfied by actions short of actual agreements. Facts indicating conscious parallelism by manufacturers or distributors, enforcement of resale price suggestions (*United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)), or even unwilling compliance by the plaintiff with a seller's price suggestions (*Albrecht* v. *Herald Company*, 390 U.S. 145, n. 6 (1968)), might satisfy this requirement. Beckman, however, failed to produce any particulars or facts which would suggest or permit the inference of a combination between Kidde and its distributors or other businessmen. The unembellished allegation of conspiracy, unsupported by any particulars disclosing a triable issue which can be called genuine, although sufficient to stand as a pleading, is insufficient to withstand a motion for summary judgment—especially after an opportunity has been given to offer details. See *Dressler* v. *MV Sandpiper*, 331 F.2d 130 (2d Cir. 1964). Rule 56(e), Fed. Rules Civ. Proc., 28 U.S.C.

Recognizing the insufficient foundation of the claimed conspiracy between Kidde and its distributors, Beckman sought to save his cause by the belated allegation that

Appendix B

Fyre-Safety and Kidde engaged in an illegal conspiracy, citing *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), condemning a conspiracy between two subsidiaries of a parent company. *Kiefer-Stewart*, however, is distinguishable on the crucial ground that the conspiracy in that case was between two competing subsidiary companies, whereas in the instant case Beckman does not contend or offer any evidence to indicate that Fyre-Safety and Kidde were in competition with one another. To the contrary, paragraph Sixth of the complaint alleges that "WALTER KIDDE & COMPANY, INC., dealt with and used the property and assets of the said defendant, FYRE-SAFETY, INC., and the said WALTER KIDDE & COMPANY, INC. so dominated the affairs of the said co-defendant, FYRE-SAFETY, INC., so as to deprive the said FYRE-SAFETY, INC. of a mind, will or existence of its own."[4]

Assuming that there were some discussions between Kidde and its puppet, Fyre-Safety, which resulted in a refusal to sell to Beckman, the court cannot conclude that such discussions constitute a combination within the meaning of Section 1 of the Sherman Act or that they represent more than internal dialogue leading to a decision on the part of a single business unit to exercise its right to select or disenfranchise a particular distributor. See *Alpha Distributing Company of California* v. *Jack Daniel Distillery*,

---

[4] In a subsequent affidavit Beckman's attorney attempts to retreat from this characterization of the relationship between the two defendants by claiming that his independent research has uncovered the fact that Kidde is a conglomerate which purchased all the stock in a number of corporations including Fyre-Safety, but nevertheless permitted these corporations to operate independently. Significantly, however, neither this nor any other affidavit of Beckman asserts that the defendants in any way competed with each other.

207 F.Supp. 136 (N.D.Cal. 1961), *affirmed*, 304 F.2d 451 (9th Cir. 1962). The district court case of *Hawaiian Oke & Liquors, Ltd.* v. *Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915 (D.Hawaii 1967), heavily relied on by Beckman in support of a broad application of *Kiefer-Stewart*, was recently reversed by the Ninth Circuit, stating at the time that "Surely a manufacturer and its national or regional distributor, whether a subsidiary or an independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott *per se* rule, in the absence of some forbidden anti-competitive or monopolistic objective." *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The conclusion that the *Kiefer-Stewart* principle is inapplicable, is consistent with the virtually unanimous opinion of legal commentators that too broad an application of this principle —in the words of two such commentators—"is inconsistent with the basic approach of antitrust limitations on business conduct. It would unreasonably penalize companies that resort to the incorporated form of doing business, hampering achievement of legitimate business goals unrelated to antitrust considerations, without substantially improving the capacity of the antitrust system to deal with anti-competitive conduct." Willis & Pitofsky, *Anti-Trust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 24 (1968). See note 47 of this article for a listing of commentators disputing the logic and advisability of a broad application of *Kiefer-Stewart*.

The parent-subsidiary conspiracy theory suffers from yet one more infirmity. Even assuming that Kidde and Fyre-Safety could conspire within the meaning of Section 1, Beckman has failed to indicate the nature of this conspir-

acy. Beckman predicates his allegation of conspiracy in part on questionable inferences arising from the defendants' claim that the refusal to ship arose out of an adjustment upward of its fire extinguisher prices. In his affidavit in opposition to the defendants' cross-motion for summary judgment, which sets forth this conspiracy theory for the first time, Beckman queried "whether there was an inter-company price increase, or was this the uni-lateral action of Fyre-Safety, Inc." He postulates that "when we have the answers to these questions, we might find an inter-company conspiracy." But one can hardly say that a Section 1 conspiracy exists because a subsidiary raises its price to a distributor upon learning by itself or from its parent that it is selling the item below an adequate profit margin. This is the factual position taken in the Yocom affidavit, and Beckman's conclusory allegations of filial conspiracy, without more, is insufficient to raise an issue.

Restraint of Trade

To constitute a Section 1 violation the contract, combination, or conspiracy must be in restraint of trade. Generally speaking, an alleged combination in restraint of trade must be evaluated in terms of its market impact and only those conspiracies which unreasonably restrain competition in a particular market are proscribed. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). However, the Supreme Court has designated certain classes of combinations as illegal *per se*, and in such cases the mere existence of the conspiracy constitutes a Section 1 violation—without any reference to market effect. Included among these illegal combinations are horizontal price fixing (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1950)), divi-

sion of markets (*United States* v. *Arnold, Schwinn & Co., supra*, at 378; *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899)), and resale price maintenance (*Dr. Miles Medical Company* v. *John D. Park & Sons Company*, 220 U.S. 373 (1911)). And, of course, a refusal to deal which is in furtherance of one of these illegal objectives, is itself a *per se* violation of the Sherman Act. *Interphoto Corporation* v. *Minolta Corporation*, 295 F.Supp. 711, 721 (S.D.N.Y. 1969), *affirmed*, 417 F.2d 621 (2d Cir. 1969). Beckman does not claim that the alleged conspiracy in this case comes within any one of these categories; nor does he allege any specific market impact arising out of the defendants' conduct.

Instead, Beckman relies on the contention that the refusal to deal in this case is a *per se* violation of Section 1 within the rationale of *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1957). He reads *Klor's* to mean that whenever there is a conspiracy resulting in a refusal to deal, Section 1 is violated. This contention runs counter to all past decisions. Were this not true, all exclusive franchises would be illegal since they are agreements between a manufacturer and a distributor requiring the manufacturer not to sell to other parties. But it is well settled that exclusive franchises in non-monopoly lines of commerce are permissible (*United States* v. *Arnold, Schwinn & Co., supra*, at 376; *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963)); even if they result in cutting off other distributors. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd., supra*, at 80-82. What Beckman failed to perceive is that the *per se* doctrine enunciated in *Klor's* has a limited area of operation. In *Klor's* the court was dealing with the rather unusual situation of a large chain

store extracting, by means of its monopoly power, an agreement from a large number of nationally known manufacturers and distributors to refuse to sell to Broadway-Hale's competitor, Klor's, or to sell to it only at discriminatory prices. The *Klor's* court carefully limited its own reach by the statement that "this is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." (p. 212). Thus treble damage actions predicated on overbroad applications of *Klor's* have been rejected with the explanation that the "Klor's case involved a predatory conspiracy with both horizontal and vertical elements directed at a single competitor with the purpose of driving that competitor from the field by foreclosing all sources of supply." *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc., supra*, at 705; *Potter's Photographic Applications Co.* v. *Ealing Corporation*, 292 F.Supp. 92 (E.D.N.Y. 1968).[7]

No facts are set forth by Beckman to bring this case within the ambit of *Klor's*. There is no averment that any source of supply other than Kidde was foreclosed to Beckman. *Carbon Steel Products* v. *Alan Wood Steel Company*, 289 F.Supp. 584, 589 (S.D.N.Y. 1968). Nor is there a hint that the other distributors of Kidde coerced Kidde not to deal with Beckman in order to eliminate Beckman as a competitor or to punish his non-compliance in a horizontal combination of the distributors. Compare *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) with *Packard*

[7] Similarly, the other group boycott cases cited by Beckman are inapposite for in all of them there was "a purpose either to exclude a person or group from the market or to accomplish some other anti-competitive objective or both." *Joseph E. Seagram & Sons, Inc.*, v. *Hawaiian Oke & Liquors, Ltd., supra*, at 76.

Appendix B

Motor Car Company v. *Webster Motor Car Co.*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957).[8]

Thus the court is constrained to conclude that no genuine issue as to any material fact exists with respect to the claimed violations of Sections 1 and 2 of the Sherman Act and that, predicated upon his complaint and affidavits, Beckman is not entitled to the luxury of a trial upon non-existent issues. The apparent controversy between the parties is based upon Beckman's misapprehension of the governing law and since it is precisely for this type of case that summary judgment is intended (see *Dressler* v. *MV Sandpiper*, *supra*; *Sadwith* v. *Lantry*, 219 F.Supp. 171, 173 (S.D.N.Y. 1963)), the court hereby grants summary judgment for the defendants. So ORDERED.

/s/ JOHN R. BARTELS
United States District Judge

[8] It is deserving of note that there must be a relation between the elements of joint action and undue restraint of trade. The only conspiracy alleged which could conceivably come within the ambit of *Klor's* is the one between Kidde and its distributors. A combination between Kidde and Fyre-Safety could hardly come within the rationale of the group boycott cases and thus, even if these two companies could and did combine, no *per se* Section 1 claim is made out.

Appendix C

Judgment and or Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of November, one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY, *Chief Judge,*

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,

Circuit Judges.

MICHAEL BECKMAN,

Plaintiff-Appellant,

v.

WALTER KIDDE & COMPANY, INC., and
FYRE-SAFETY INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
Second Circuit

FILED
November 22, 1971
A. Daniel Fusaro, *Clerk*

71-1058

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IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No.

MICHAEL BECKMAN,

Petitioner,

against

WALTER KIDDE & COMPANY, INC. and FYRE-SAFETY INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 31, 1972

INDEX

	PAGE
Question Presented	1
Statement of the Facts	2
Argument	5
Conclusion	12

TABLE OF AUTHORITY

Cases:

Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 F. 46, 49 (2d Cir. 1915) 9

Hoffman v. *Riverside and Dan River Cotton Mills*, 55 F.Supp. 13, 15 (S.D.N.Y. 1944) 11

Johnson v. *J. H. Yost Lumber Co.*, 117 F. 2d 53 (8th Cir. 1941) 10, 11

Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1957) 8

United States v. *Colgate & Co.*, 250 U. S. 300 (1919) 10

Rules:

Supreme Court Rules

19 ..... 1, 5, 6

23(e) 2

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Question Presented

In this antitrust case, the District Court and the Circuit Court of Appeals for the Second Circuit found that the petitioner [to quote from the *per curiam* decision of the Circuit Court of Appeals, Chief Judge Friendly and Circuit Judges Waterman and Smith sitting] "failed to raise genuine issues as to the existence of any material fact entitling plaintiff to a trial"; and petitioner did not and cannot show that these findings were erroneous as a matter of law. In such case, does the petition present any of the reasons identified by Rule 19 of the rules of this Court as being so "special and important" that a writ of certiorari will be granted as a matter "of sound judicial discretion"?

Statement of the Case

Respondents are compelled to make a further Statement of the Case because that of petitioner is inadequate and not a fair and accurate statement containing (in the words of Rule 23(e) of the rules of this Court) "the facts material to consideration of the questions presented".

As a matter of fact, the petitioner's Statement could not have been drafted with the objective of compliance with Rule 23(e), for it is a word for word copy of the first six paragraphs of its "Statements of Facts" contained in his brief submitted to the United States Court of Appeals.

An adequate, fair and accurate statement of the facts is set forth in the opinion of the Trial Judge, an opinion which the Circuit Court of Appeals characterized as "comprehensive", as follows:

> "Plaintiff, Michael Beckman, entered into a written Regional Distributorship Agreement with the defendant Fyre-Safety, Inc.,[1] whereby Beckman was granted the exclusive right in certain New York counties to sell fire alarm systems manufactured by the defendants. At the same time Fyre-Safety entered into an oral understanding with Beckman granting Beckman the right to purchase from Fyre-Safety fire extinguishers purchased from the co-defendant, Walter Kidde & Company, Inc.[2] In March, 1967, the defendants refused to sell any more fire extinguishers to Beckman. Claiming that both defendants and their distributors or other 'businessmen' had conspired to restrain and monopolize com-

[1] Fyre-Safety, Inc. was a wholly-owned subsidiary of Walter Kidde & Company, Inc., which ceased doing business on December 31, 1967.

[2] Beckman claims that the right to purchase Kidde fire extinguishers was an oral term of the written distributorship agreement. The defendants assert that Beckman was permitted to purchase the extinguishers as a matter of courtesy. Resolution of this dispute is not here required.

merce in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§1[3] and 2,[4] Beckman brought this action for treble damages and reasonable attorney's fees. He now moves for summary judgment upon these claims, and the defendants cross-move for the same relief. The facts as set forth in Beckman's pleadings and affidavits are susceptible of a brief exposition.

After the execution of the written franchise agreement and the oral agreement with respect to fire extinguishers, Frye-Safety, in March, 1967, refused to continued to sell Beckman fire extinguishers which they had previously supplied. Beckman asserts that this refusal to sell was pursuant to a conspiracy with distributors or businessmen and therefore constitutes a *per se* violation of the Sherman Act. The allegation of conspiracy first appears in the complaint wherein Beckman alleges that 'on or about the 8th day of March, 1967, the defendant, WALTER KIDDE & COMPANY, INC., entered into an agreement with its distributors of fire extinguishers other than the plaintiff wherein and whereby it was agreed that the plaintiff would be denied the right to make further purchases of the Walter Kidde line of fire extinguishers.' In his affidavit in support of his motion for summary judgment Beckman's only reference to a conspiracy is his description of the cause of action as one 'to recover damages under Sections 1 and 2 of the Sherman Act upon the ground that the defendants conspired with other businessmen to deprive the

[3] Section 1 provides in pertinent part:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

[4] Section 2 provides in pertinent part:
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

plaintiff of access to merchandise which the plaintiff had been previously selling and renting to members of the general public.'

Kidde and Frye-Safety do not contest the contractual background and the refusal to sell but strongly dispute Beckman's allegation that Frye-Safety refused to ship to Beckman because of a conspiracy. In support of this position, the defendants submitted the affidavit of William R. Yocom (the National Sales Director for Frye-Safety in the years 1966 and 1967), wherein he states that he is thoroughly familiar with the facts of the case and that he categorically denies the existence of any conspiracy. He further deposes that Frye-Safety was always willing to sell fire extinguishers to Beckman but that Beckman refused to pay Frye-Safety's price increase for the extinguishers. Yocom further avers in his affidavit that 'Fyre-Safety was a small company, Kidde itself does not dominate the fire extinguisher field, and plaintiff could easily have purchased fire extinguishers from any number of companies some smaller and some larger than Kidde.' Beckman does not dispute this latter statement.

• • •

Defendants submitted a second affidavit by William R. Yocom which *substantiates* in greater detail their position that the refusal to deal was not pursuant to a conspiracy and that no factual, and hence no triable issue, existed on this claim. Specifically, he states that Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase, that the decision was made without consultation with any distributor, competitor, or any other person, that the increase was applied equally to all distributors who wished to purchase fire extinguishers, and that at all times it was willing and indeed anxious to sell the plaintiff or any other customers fire extinguishers at the increased price." *(Italics ours)*

ARGUMENT

This case presents no special and important reasons which, as a matter of sound judicial discretion, justify the granting of a writ of certiorari. None of the guideline or illustrative reasons set out in Rule 19 are present here:

- This is no appeal from a decision by a state court involving a decision by it of a federal question of substance or from a state court's decision which was decided in a way probably not in accord with the applicable decisions of this court. (Here the decision of the Court of Appeals is not in conflict, but is in conformity, with the decisions of other circuits on the same matter.)

- The decision below did not decide an important state or territorial question in a way in conflict with applicable state or territorial law.

- No important question of federal law was decided below which has not been, but should be, settled by this Court, nor has the decision below determined a federal question in a way in conflict with applicable decisions of this Court. (On the contrary, the decisions below are based on well-settled precedents.)

- There was no departure here from the accepted and usual course of judicial proceedings or the sanctioning of such a departure by a lower court so as to call for an exercise of this Court's power of supervision.

Affirmatively stated, the petition before this Court should be dismissed because the court below did no more than rightly to decide a case on the merits and on the basis of precedents of this Court and of well-established decisions by lower courts enunciating principles recognized in every circuit in the land.

When the petition is analyzed, basic misconceptions of substance and procedure are revealed. The procedural misconception is clearly outside (to quote from Rule 19) "the character of reasons" which will be considered by this Court and is peculiarly appropriate for a decision by lower courts. These considerations involve nothing more than the well-known bases on which summary judgment is either granted or denied. The District Court (see pp. 7a-9a of Appendix B to the petition herein) stated these 'non-Rule 19' considerations succinctly as follows:

> "The purpose of a summary judgment is to screen out sham issues and 'to discover whether one side has no real support for its version of the facts,' (*Community of Roquefort* v. *William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962)), and 'summary judgment cannot be defeated by the vague hope that something may turn up at trial.' *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); see *Radio City Music Hall Corporation* v. *United States*, 135 F.2d 715 (2d Cir. 1943); *Jones* v. *The Borden Company*, Slip Op. No. 28278, 5th Cir., July 15, 1970. Following the caveat of the Court of Appeals that 'there may be some instances where summary judgment is too blunt a procedural device for deciding difficult cases. See for example, *Miller* v. *General Outdoor Advertising Co.*, 337 F.2d 944 (2d Cir. 1964)' (*Perma Research and Development Co.* v. *Singer, supra*, at 578; *Dolgow* v. *Dillon*, Slip Op. No. 711, 2d Cir., September 2, 1970), the court deferred its decision on the motion and offered to set down the application for a hearing one month thereafter, on June 10, 1970, in order to enable Beckman to establish, if possible, any specifics or facts in support of the existence of the conspiracy or the restraint of trade alleged as a *per se* violation of Section 1. See Rule 43(e), Fed. Rules Civ. Proc., 28 U.S.C.; 6 Moore's Fed. Prac. ¶56.11(7). During this interlude Beckman would have had ample opportunity, by means of discovery, to identify any dis-

tributors or others who were parties to the alleged conspiracy and to supply some evidence indicating in what manner there had been a restraint of trade.

Although in his papers he formally cried out for discovery, Beckman rejected the court's overture with its accompanying opportunity and, instead, relied upon the sufficiency of the complaint and affidavits already submitted. It was the court's inclination to immediately grant summary judgment in favor of the defendants. However, to remove any doubts as to whether any triable issue existed, the court then requested both parties to submit additional affidavits supporting their respective positions, which they did. Beckman submitted two additional affidavits but neither of them indicates that there exists a genuine issue as to a material fact necessary to defeat a summary judment motion.[5]

Upon examination of the pleadings and the affidavits submitted by both parties, together with Beckman's refusal to resort to any further discovery proceedings, the court is convinced that there is no genuine issue as to a material fact with respect to the alleged violation of Section 1 of the Sherman Act."

Petitioner's misapprehensions concerning the governing substantive law have also been comprehensively and correctly dealt with by the District Court. What it called "Beckman's misapprehension of the governing law" [page 16a of Appendix B to the petition herein] flows, it is respectfully submitted, from a basic failure to perceive that this case involves a mere and legitimate refusal by a trader to sell a commercial product to a buyer because the buyer refuses to buy the product except at the price in effect before a price increase. This refusal to sell is so characterized as mere and legitimate because, as the Trial Court

[5] The first one is by Beckman's attorney and merely argues that although Fyre-Safety was a wholly-owned subsidiary of Walter Kidde & Company, Inc., it nevertheless operated independently. The other affidavit, sworn to by Beckman, is addressed to a point not relevant to the issues presently before this court.

found, and as the Circuit Court confirmed, it is unaccompanied, *in fact,* by any contract, combination or conspiracy in restraint of trade.

This pervasive and basic misconception by the petitioner has as its progeny reliance by him on a number of cases which deal with the 'illegitimate' situation of a refusal to deal in the context of contract, combination or conspiracy in restraint of trade. These inapposite cases are specifically dealt with by the District Court, and soundly distinguished, in its opinion attached to the Petition herein as Appendix B. This Court is respectfully referred to that opinion, particularly that part thereof (pp. 11a, 12a, and 13a of Appendix B) which deals with cases on conspiracy between parent and subsidiary; also that part (page 14a of Appendix B) which explains the inapplicability here of the cases involving classes of combinations which are illegal *per se,* for example, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1957) and the exclusive franchise in non-monopoly lines of commerce cases (page 14a of Appendix B).

Once petitioner's basic and pervasive misapprehension of the essential nature of the present case is understood, then it is also understood that while cases involving combination, conspiracy, etc. are not in point, the cases dealing with a refusal by a trader acting alone to sell his product to another, are in point.

Before citing these cases which are in point, certain facts which were before the Trial Court, and are in its opinion, should be specifically mentioned in the interests of preventing any misconception regarding the nature of this case.

ONE. This is not a franchise case, for the franchise covered fire alarm systems and the alleged refusal to deal relates to fire extinguishers, a different product not the subject of petitioner's franchise. (Pages 3a and 4a of Appendix B)

Two. Respondent Frye-Safety is a small company. Respondent Kidde does not dominate the fire extinguisher field and plaintiff and petitioner could easily have purchased fire extinguishers from any number of companies, some smaller and some larger than Kidde (page 6a of Appendix B). Respondent Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase; the decision was made without consultation with any distributor, competitor, or any other person; the increase was applied equally to all distributors who wished to purchase fire extinguishers; and at all times it was willing and indeed anxious to sell the plaintiff or any other customer fire extinguishers at the increased price (page 9a of Appendix B).

THREE. As the Court found (page 6a of Appendix B): "Following the alleged refusal to sell on March 8, 1967, Beckman terminated his distributorship agreement with Fyre-Safety by means of a letter dated April 12, 1967, written by his attorney, in which no mention was made that the termination was in any way due to defendants' refusal to sell or to any conspiracy." This action is thus a patent afterthought, a mere tactic, having no roots in the merits.

Returning now to the precedents which are in point on the facts as they were found by the Trial Court to exist:

At common law before the enactment of the Sherman Act it was within the seller's discretion to accept or reject a buyer and this right was preserved, not altered, under the Sherman Act. As was stated in the case of *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 F. 46, 49 (2nd Cir. 1915):

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him. It might be because he did not like the other's business methods,

> or because he had some personal differences with him, political, racial or social. That was purely his own affair with which nobody else had any business. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customer is made for him by the Government."

Four years later in the landmark case of *United States* v. *Colgate,* 250 U. S. 300 (1919), the Supreme Court affirmed the result in *Great Atlantic* and stated at page 307:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged or who wish to engage in trade and commerce, in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly the act does not restrict the long recognized right of trader and manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Recent cases continue to uphold the principle that, absent a showing of conspiracy or attempt to monopolize, a mere refusal to deal is not a violation of the Sherman Act. In *Johnson* v. *J. H. Yost Lumber Co.,* 117 F. 2d 53 (8th Cir. 1941), for example, defendant distributors were held to be not in violation of the Sherman Act for a refusal to sell to plaintiff. The Court stated at page 61;

> "It must be borne in mind that one engaged in private enterprise may select his own customers and in the absence of an illegal agreement may sell or refuse to sell to a customer for good cause or for no cause whatsoever."

In fact, as *Johnson* indicates, the Clayton Act itself, 15 U.S.C.A. Sec. 13, specifically provides:

> "That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The seller's right to select customers extends even where the marketed goods are the subject of a trademark. In *Hoffman* v. *Riverside and Dan River Cotton Mills,* 55 F. Supp. 13, 15 (S.D.N.Y. 1944), the court stated:

> "I know of no authority which says that a manufacturer of a product sold under a trade name cannot acting alone and under the circumstances here disclosed pick his customers and refuse to sell to those who for any particular reason he does not care to do business with."

It is also clear that a manufacturer's refusal to sell will not in and of itself give rise to an inference of conspiracy. In *Johnson,* the Court stated at page 61:

> "From the mere fact of refusing to sell to plaintiffs there can thereafter arise no inference of an unlawful agreement because one may lawfully select his own customers. There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred."

In fact even though the courts afford plaintiffs wide evidentiary latitude to prove a conspiracy, a bare refusal to sell does not even qualify as circumstantial evidence: In *Hoffman,* the plaintiff, as in this case, buttressed a conspiracy charge on defendants' refusal to sell to plaintiffs while selling to others.

The court rejected plaintiffs' contention of conspiracy and stated at page 16:

> "It is true that under the law, a conspiracy cannot and does not have to be established by direct evidence.

> The court has the right to look to the conduct of the parties and their acts under all the circumstances. The court cannot open the minds or the heads of the parties charged with a conspiracy and definitely say and determine what their intentions were. But before we can find there was such a combination as charged here, there must be some concrete evidence from which the court can draw the proper and necessary inference to establish the conspiracy. But the evidence here considered as a whole, and in the light most favorable to the plaintiff, and considering the witnesses, their manner and demeanor on the stand, wholly fails to meet that test."

CONCLUSION

For the reasons stated the Petition for a Writ of Certiorari should be in all respects denied.

Respectfully submitted,

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